UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MURIEL BILODEAU,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-54-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges that she is disabled by fibromyalgia, back and leg pain, depression and anxiety and chronic pain secondary to a foot injury, is capable of performing work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 19, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

law judge found, in relevant part, that the plaintiff had acquired sufficient quarters of coverage to remain insured through the date of decision, Finding 1, Record at 93; that she had fibromyalgia and residual effects of Morton's neuroma, impairments that were severe but did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Findings 3-4, *id*.; that she retained the residual functional capacity ("RFC") to perform less than the full range of light work, Finding 7, *id*.; that she was unable to perform any of her past relevant work, Finding 8, *id*. at 94; that based on her exertional capacity for a substantial range of light work and her age ("younger individual between the ages of 18 and 44"), education (high school or equivalent) and work experience (no transferable skills), Rule 202.21 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid"), would suggest a conclusion of "not disabled," Findings 9-13, *id*.; and that she therefore was not under a disability at any time through the date of decision, Finding 14, *id*. The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant

work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's RFC to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff identifies two points of error. *See generally* Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 5). First, she complains that the administrative law judge relied on two RFC evaluations, one performed at the behest of (and adopted by) treating physician Alan Ross, M.D., and one submitted by Disability Determination Services ("DDS") non-examining consultant Robert Hayes, D.O., without acknowledging or resolving a material discrepancy between them. *See id*. at 10-14. Second, she asserts that he erroneously determined her asserted mental impairments to be non-severe. *See id*. at 14-15. Inasmuch as I find remand warranted on the basis of the first point of error, I do not reach the second.

I. Discussion

Dr. Ross, a specialist in physical medicine and rehabilitation, first saw the plaintiff on December 14, 1999 following referral from her primary-care physician, Michael Szela, M.D. *See* Record at 336-37. In a letter to Dr. Szela dated January 14, 2002 Dr. Ross noted, "I feel that she has work capacity and told her so. However, it is difficult to determine work restrictions solely on the basis of a brief office visit. I ordered a functional capacity evaluation to aid in determining whether she requires any permanent work restrictions." *Id*. at 337.

The functional-capacity evaluation in question was performed by Robert H. Brainerd, L.A.T.C., CCSC, Assessment Specialist, on January 30, 2002 and relayed to Dr. Ross by letter of the same date.

See id. at 338-46. Brainerd reported to Dr. Ross, *inter alia*, that he believed the assessment, which found a "sedentary-light part-time work capacity[,]" *id*. at 339, was "a **Valid** representation of Muriel Bilodeau's present physical capabilities[,]" *id*. at 338 (emphasis in original). Under a section of his report titled "WORKDAY TOLERANCE RECOMMENDATIONS: 3 to 4 hours[,]" Brainerd assessed the plaintiff as capable of sitting for four hours in forty-five minute durations, standing for two hours in twenty-minute durations and walking "minimally occasional" short distances from one to two hours. *See id*. at 344.

The plaintiff returned to Dr. Ross for a followup "of chronic pain in multiple areas" on May 9, 2002. *See id*. at 382. Based on a check of eighteen diagnostic points for fibromyalgia, fourteen of which were positive, Dr. Ross diagnosed her as having that condition. *See id*.[2] From that time through the date of the plaintiff's hearing before the administrative law judge on January 9, 2003, *see id*. at 96, she saw Dr. Ross for seven additional followup visits, on June 13, 2002, June 27, 2002, July 11, 2002, July 18, 2002, September 9, 2002 and November 14, 2002. *See id*. at 375, 377-81. As counsel for the commissioner conceded at oral argument, this treatment history qualifies Dr. Ross as a treating source. *See* 20 C.F.R. § 404.1502 ("*Treating source* means your own physician, psychologist, or other acceptable medical source who provides you, or has provided you, with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with you."). In his note of the September 9, 2002 visit Dr. Ross stated: "She applied for SSI. I feel she has part-time work capacity." *Id*. at 377. It is therefore a reasonable inference that Dr. Ross adopted the Brainerd evaluation.

[2] Fibromyalgia is defined as "[a] syndrome of chronic pain of musculoskeletal origin but uncertain cause." Stedman's Medical Dictionary 671 (27th ed. 2000). "The American College of Rheumatology has established diagnostic criteria that include pain on both sides of the body, both above and below the waist, as well as in an axial distribution (cervical, thoracic, or lumbar spine or anterior chest); additionally there must be point tenderness in at least 11 of 18 specified sites." *Id*.

In an April 10, 2002 RFC evaluation, Dr. Hayes assessed the plaintiff as capable, *inter alia*, of standing and/or walking (with normal breaks) for a total of at least two hours in an eight-hour workday and sitting (with normal breaks) for a total of about six hours in an eight-hour workday. *See id*. at 247, 253. He checked a box indicating that his conclusions about the plaintiff's limitations or restrictions were not significantly different from statements on file by examining and treating sources. *See id*. at 252. On the same page someone (whom I will refer to as Dr. Hayes' "assistant," given the difference between this person's handwriting and that of Dr. Hayes) summarized record evidence bearing on RFC. *See id*. The assistant capsulized the Brainerd RFC evaluation as follows: "Functional capacity eval 1/30/02 – sit 45 minutes duration for 4 hrs, stand 20 min duration 2 hours, walk minimally 1-2 hours; able to lift up to 19.2 # occasionally[.]" *Id*. The assistant made no reference to Brainerd's overall limitation to part-time work. *See id*.

This omission may account for Dr. Hayes' representation that his RFC evaluation was not significantly different from those of other examining and treating sources, including Brainerd. In any event, as the plaintiff points out, *see* Statement of Errors at 13, Dr. Hayes' evaluation was in fact materially different from that of Brainerd. Dr. Hayes suggested that the plaintiff could work full-time; Brainerd found that she could not. For purposes of Step 5 of the sequential-evaluation process, a claimant must be able to engage in full-time work ("8 hours a day, for 5 days a week, or an equivalent work schedule") to be found non-disabled. Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2004) ("SSR 96-8p"), at 144; *see also, e.g., Bladow v. Apfel*, 205 F.3d 356, 359 (8th Cir. 2000) (commissioner's position, based on interpretation of SSR 96-8p, is that claimant must be able to work full-time to be found not disabled at Step 5); *Carr v. Apfel*, 66 Soc. Sec. Rep. Serv. 654,

658 (N.D. Ohio 1999) ("The ability to work on a part-time basis is relevant only at step four – and not step five – of the sequential evaluation process.").

The RFC assessment form that Dr. Hayes completed calls for medical experts who reach significantly different conclusions than those of treating or examining sources to explain the discrepancy. *See* Record at 252. Inasmuch as Dr. Hayes did not deem his RFC conclusions significantly different from those of Brainerd, he did not do so.

This error, in turn, carried over into the analysis of the administrative law judge, who stated: "[T]he record does not establish any impairment which would affect the claimant's ability to sit for up to six hours in an eight hour day with ordinary breaks. This finding is consistent with that of the State Agency physicians (Exhibit 3F) [Dr. Hayes' RFC evaluation] and with the functional capacity assessment done (Exhibit 14F) [the Brainerd RFC study]. These conclusions are also consistent with the medical evidence as a whole." *Id*. at 91.

In fact, as noted above, there was a serious inconsistency between the Brainerd RFC study (which was adopted by a treating source, Dr. Ross) and the Hayes RFC assessment. Inasmuch as the administrative law judge did not acknowledge that conflict, he did not resolve it.[3] A court cannot step into the breach and resolve such a material evidentiary conflict in the first instance on review. *See* SSR 96-8p, at 149 ("In assessing RFC, the adjudicator must discuss the individual's ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule), and describe the maximum amount of each work-related activity the

[3] This is puzzling, given that the administrative law judge indicated at hearing both that he understood the Brainerd study limited the plaintiff to part-time work and that such a limitation, if adopted, would direct a conclusion of disability. *See*

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individual can perform based on the evidence available in the case record. The adjudicator must also explain how any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved.") (footnote omitted); *Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.").

What is more, the Brainerd RFC evaluation was adopted by a treating physician, Dr. Ross. While an administrative law judge can reject such an opinion, he or she "must explain why the opinion was not adopted." SSR 96-8p, at 150; *see also* 20 C.F.R. § 404.1527(d)(2) (regardless of the subject matter as to which a treating physician's opinion is offered, the commissioner must "always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion."). Again, no such analysis was offered in this case.

For these reasons, reversal and remand for further proceedings is warranted.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for proceedings not inconsistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

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Record at 124-25.

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of November, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

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